

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





ORIGINAL

74-1607

**United States Court of Appeals**

For the Second Circuit.

MIKE O'HARA,

Plaintiff-Appellant,

-against-

MOORE-McCORMACK LINE, INC.,

Defendant-Appellee.

*On Appeal From The United States District Court  
For The Southern District Of New York*

**Appellant's Appendix**

RASSNER AND RASSNER  
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A-2

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
MIKE O'HARA,

Plaintiff,

-against-

MOORE-McCORMACK LINES, INC.,

Defendant.

NOTICE OF APPEAL

70 Civ. 4011  
(RJW)

-----X  
S I R S:

PLEASE TAKE NOTICE that the plaintiff MIKE O'HARA hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment entered on the 11th day of January, 1974 on a Jury special verdict in favor of the plaintiff in the sum of \$8,140.00 and finding the plaintiff guilty of contributory negligence to the degree of 75%, reducing the amount of the award to \$2,035.00, and from the order of the Court denying the plaintiff's motion to set aside the verdict on the ground of inadequacy and granting a new trial.

Dated: New York, N.Y.  
January 30, 1974.

Yours, etc.,

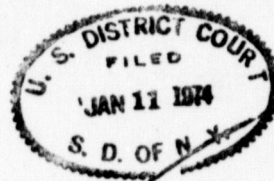
*Reuben Kassner*  
KASSNER & KASSNER  
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15 Park Row  
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TO:

HYDE, DICKERSON & REILLY, ESQS.,  
Attorneys for Defendant  
61 Broadway  
New York, N.Y. 10006



A-3



JUDGMENT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
MIKE O'HARA, : 70 Civil 4011(RJW)  
Plaintiff, :  
-against- : JUDGMENT  
MOORE-McCORMACK LINES, INC., : # 74,053  
Defendant. :  
----- X

The issues in the above entitled action having been brought on regularly for trial before the Honorable Robert J. Ward, United States District Judge, and a jury on January 2, 3, 4, 7, 8 and 9, 1974, and the Court having submitted the attached special verdict to the jury, and the jury having answered the said special verdict as indicated thereon, and the jury having returned the special verdict in favor of the plaintiff in the amount of \$8,140.00., and the jury having further found that the plaintiff contributed to the negligence to the degree of 75% thereby reducing the amount of the award to \$2,035.00., it is,

ORDERED, ADJUDGED AND DECREED, that plaintiff, MIKE O'HARA, have judgment against the defendant, MOORE-McCORMACK LINES, INC., in the amount of \$2,035.00.

Dated: New York, N. Y.  
January 10, 1974

MICROFILM  
JAN 11 1974

*Raymond F. Boughardt*  
Clerk 1/11/74

APPROVED:

*Robert J. Ward*  
United States District Judge

VERDICT

A-4

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
MIKE O'HARA,

Plaintiff,

-against-

MOORE-MCCORMACK LINES, INC.,

Defendant.  
-----X

VERDICT

:  
: 70 Civ. 4011  
:

1. Has plaintiff established his claim that the ship S.S. BRABILL was in an unseaworthy condition and that this unseaworthiness was a proximate cause of plaintiff's accident? (Answer yes or no) No

2. Has plaintiff established his claim that the Defendant was negligent and that its negligence was a proximate cause of plaintiff's accident? (Answer yes or no)

YES

3. If the answer to both Questions 1 and 2 is "no", your verdict is for the defendant, and you should put an "X" here, and you need not answer any further questions. \_\_\_\_\_



4. If the answer to either Question 1 or 2 is "yes", what is the total dollar amount of damages to plaintiff? \$ 8140

5. In the event you have found above that the plaintiff is entitled to recover, do you find that the defendant has established its claim that plaintiff was himself negligent and that his negligence was a proximate cause of the accident? (Answer yes or no)

YES

6. If the answer to Question 5 is "yes", what percentage did plaintiff's fault so contribute? 75%  
(If the answer to Question 5 is "no", do not answer this question.) If you entered a percentage on this question, fill in its equivalent dollar amount here. \$ 6105

7. Subtract the dollar amount stated in Question 6 from the total amount of damages stated in Question 4 and enter here the difference, which will be the net amount of damages you find the plaintiff is entitled to recover:

Question 4 total	\$ <u>8140.00</u>
- Question 6 total	\$ <u>6105.00</u>
Net Recovery	\$ <u>2035.00</u>

COMPLAINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
MRS. O'HARA,

Plaintiff,

-against-

MOORE-MCCORMACK LINES, INC.,

Defendant.

----- x

: Plaintiff Demands a  
: Trial by Jury

: SEAMAN'S CASE

: Under Jones Act for  
: Personal Injuries

ACTION UNDER SPECIAL ACT OF CONGRESS  
ENABLING SEAMEN TO SUE WITHOUT PRE-  
PAYMENT OF COSTS OR THE GIVING OF  
SECURITY THEREFOR

Plaintiff, by his attorneys WELSH & STERLING,  
for his complaint, respectfully alleges:

FOR A FIRST COUNT

1. At all the times hereinafter mentioned, the defendant was and is a ~~domestic~~ corporation, with offices for the transaction of business in the City, County and State of New York, and within the jurisdiction of this Court.

2. At all the times hereinafter mentioned, the defendant owned the SS BRASIL.

3. At all the times hereinafter mentioned, the defendant operated the SS BRASIL.

4. At all the times hereinafter mentioned, the defendant managed the SS BRASIL.

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5. At all the times hereinafter mentioned, the defendant controlled the **SS BRASIL**.

6. At all the times hereinafter mentioned, the defendant equipped and manned the **SS BRASIL**.

7. On or about the **19th day of May, 1969** the plaintiff was employed as a member of the crew of the **SS BRASIL** in the capacity of **Wife Steward** and except as otherwise indicated, was a member of the said crew at all the times hereinafter mentioned, and was engaged in the furtherance of his duties and of the interests of the defendant.

8. It was the obligation and duty of the defendant to furnish plaintiff with an adequate number of officers and co-employees, Master and other officers; to furnish plaintiff with a safe place in which to do his work; to supply him with suitable and safe means, materials, and appliances in and for the performance of his work; to maintain the same in proper condition for the proper performance of the said work, to promulgate and enforce proper rules in relation to the foregoing, and to inspect the aforesaid materials, appliances and means; to provide plaintiff with a safe and seaworthy vessel; and to warn plaintiff of the dangers to be encountered in the performance of his work.

9. On or about the **19th day of May, 1969**, while plaintiff was acting within the scope of his employment and in the interests of the defendant herein, he was caused to become seriously injured, as hereinafter more fully described, all by reason of the carelessness and negligence of the defendant, its officers, agents, servants, employees and other persons for whom the defendant was responsible, and in violation of the aforesaid

duties and obligation, without any fault or negligence upon the part of the plaintiff herein.

10. That on or about May 19, 1969, while plaintiff was actually engaged in the course of his duties aboard the aforesaid vessel, he was caused to be thrown down from the ship's escalator which was defective and inadequate and also because of defendant's failure to furnish him with adequate and sufficient aid and assistance; and as a result thereby plaintiff sustained injuries to his head, back and right knee; and

plaintiff was otherwise injured at or about his body and person with attendant injury to his nerves and nervous system; plaintiff has suffered and will suffer great pain, agony and mental anguish; has paid out and will pay out large sums of money for medical and surgical attention and medicines; has lost and will lose large sums of money which he otherwise would have earned as wages and in the form of board and lodging; that he has been forced to defray the cost of his maintenance and cure; and that plaintiff verily believes he has been permanently injured, all to his damage in the sum of **TWO HUNDRED THOUSAND DOLLARS (\$200,000)**.

11. Plaintiff brings this action pursuant to Section 33 of the Merchant Marine Act of 1920, commonly known as the "Jones Act," and all statutes amendatory thereof and supplementary thereto.

FOR A SECOND COUNT

12. Plaintiff realleges each and every allegation contained in paragraphs "1" to "11," inclusive, as fully and completely as though herein repleaded at length.



13. That it was the absolute and non-delegable duty of the defendant to furnish plaintiff with a safe and seaworthy vessel, which duty the defendant failed to carry out, thereby causing the plaintiff to sustain the injuries hereinbefore described, to his damage in the sum of **TWO HUNDRED THOUSAND DOLLARS (\$200,000)**.

WHEREFORE, plaintiff demands judgment on the first count in the sum of **TWO HUNDRED THOUSAND DOLLARS (\$200,000)**; and on the second count in the sum of **TWO HUNDRED THOUSAND DOLLARS (\$200,000)**; together with interest, costs, and disbursements of this action.

**KLEIN & STERLING**  
Attorneys for Plaintiff

By Benjamin B. Sterling  
A Member of the Firm  
Office and P. O. Address  
15 Park Row  
New York, New York 10038  
227-3787

ANSWER

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

MIKE O'HARA,

:

Plaintiff,

:

-against-

:

70 Civ. No. 4011

MOORE-McCORMACK LINES, INC.,

:

ANSWER

Defendant.

:

----- x

Defendant, MOORE-McCORMACK LINES, INCORPORATED,  
sued herein as MOORE-McCORMACK LINES, INC., answering the  
complaint by its attorneys, BROWNE, HYDE & DICKERSON, alleges  
upon information and belief as follows:

AS TO THE FIRST CAUSE OF ACTION

FIRST DEFENSE

1. Denies each and every allegation contained  
in paragraphs "SEVEN", "EIGHT", "NINE" and "TEN" except  
that it admits that on or about May 19, 1969 the plaintiff  
was employed as a wine steward aboard the SS BRASIL.

SECOND DEFENSE

2. If plaintiff sustained any injuries as alleged  
in the complaint, which is expressly denied, said injuries  
were caused in whole or in part by plaintiff's own negligence



and were not caused or contributed to in any manner by the negligence of this defendant.

AS TO THE SECOND CAUSE OF ACTION

FIRST DEFENSE

3. Repeats and realleges each and every allegation set forth above as though fully set forth herein and denies each and every allegation contained in paragraph "THIRTEEN" of the complaint and leaves all questions of law therein for the Court to determine.

SECOND DEFENSE

4. If plaintiff sustained any injuries as alleged in the complaint, which is expressly denied, said injuries were caused in whole or in part by plaintiff's own negligence and were not caused or contributed to in any manner by the negligence of this defendant.

WHEREFORE, defendant demands judgment dismissing the complaint herein together with the costs and disbursements of this action.

Dated: New York, N. Y.  
January 12, 1971

BROWNE, HYDE & DICKERSON  
Attorneys for Defendant

By: \_\_\_\_\_  
A Member of the Firm  
61 Broadway  
New York, N. Y. 10006

TO: KLEIN & STERLING, ESQS.  
Attorneys for Plaintiff  
15 Park Row  
New York, N. Y. 10038

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A-12  
EXCERPTS FROM TRANSCRIPT OF TESTIMONY

36

1 MP 2 Gaston F. Guyon, Bell Steward, for plaintiff,  
direct

2 G A S T O N F . G U Y O N , called as a witness by  
3 the plaintiff, being first duly sworn, testified as  
4 follows:

5 DIRECT EXAMINATION

6 BY MR. SCHWARTZ:

7 Q Mr. Guyon, on May 21, 1969, by whom were you em-  
8 ployed?

9 A By Moore-McCormack Lines.

10 Q And were you employed on a particular ship?

11 A Yes: on the S/S Brasil.

12 Q Now, before May 21, 1969, how long had you worked  
13 on that ship?

14 A I had been on the ship for a period of a month and  
15 a half.

16 Q What was your position on the ship?

17 A I was bell steward.

18 Q On may 21, 1969, did you witness an occurrence?

19 A Yes; I did.

20 Q What did you see?

21 A I saw Mr. O'Hara fall right off the escalator  
22 leading from the kitchen up to the main deck, to the dining  
23 room deck.

24 Q And is that kitchen referred to as a galley, some-  
25 times?



1 Mr. 3 Guyon - direct

2 A Yes. The below level is the main galley, is the  
3 kitchen, and there's two escalators, one going up and the  
4 other one running down, similar to those that you see in  
5 those big department stores, and --

6 Q All right. Just --

7 A I am sorry.

8 Q Which escalator was he on when you saw him: the one  
9 going up or the one going down?

10 A Going up. He was about to go up, as a matter of  
11 fact.

12 Q And where were you at that time?

13 A I was standing on the platform at the beginning of  
14 the, you know, as you -- the platform on the dining room deck.

15 Q Well, was that anywhere near the escalators?

16 A Right in front of it.

17 Q All right. Had you intended to use at that time  
18 any of the escalators?

19 A Yes. I was about to proceed down the escalator.

20 Q All right. Now, as you were at that point, did you  
21 see Mr. O'Hara on the escalator going up?

22 A Yes. He was just boarding the escalator.

23 Q Well, my question is --

24 A In other words, he -- one of his -- he had already  
25 made a motion. He was already on the escalator.

1 MP 4 Guyon - direct

2 Q That's what I wanted to ask. Was he on the  
3 escalator?

4 A Yes; he was.

5 Q All right. Now, after he was on the escalator,  
6 what if anything did you either see or hear or notice?

7 A Well, what I heard was like a metal -- like, you  
8 know, a hard noise of metal scratching one another and like  
9 a sound, cable sound, like, you know, and I saw the escalator  
10 jerk.

11 Q And what else, if anything, did you see?

12 A Well, at this moment, Mr. O'Hara was projected  
13 backward, and he fell down with a rack of glasses that he  
14 was holding in his hands.

15 Q What if anything did you do after you saw that?

16 A Well, I immediately rushed down and tried to give  
17 assistance, and as I reached Mr. O'Hara, he was laid on his  
18 back.

19 Q Was he conscious or unconscious?

20 A No; he was unconscious.

21 Q And did you do anything after that?

22 A Well, I leaned down to try to help him up, and  
23 then I had a second thought, you know. I was confused, seeing  
24 him like this, so I decided not to touch him, because as a  
25 rule when people get hurt on board ship it is not good to try

\* \* \*



MP 7 Guyon - direct

A I was about to go down, so that would be the escalator going up, the one that Mr. O'Hara was on.

Q And had you noticed that elevator jerking at that time, whether it was that day or any other day, before that hour or hour and a half that the accident happened?

A I believe it was during the same voyage, two days before, that I myself had been on this same escalator and was shaken by the jerk, and had I carried anything in my hands I would have been in trouble.

Q Now, I think you said you were on this ship about a month and a half before this accident, approximately?

A Yes.

Q Oh, about how many times would you say all together you may have seen this jerking of the elevator?

A During my last period on the vessel -- we are talking about May of 1969 -- I would say about a good four times, myself, and being at the bell station, we had several complaints coming in, because this is where all the complaints are being phoned in to the bell station, mostly.

Q Now, still talking about this same voyage, about when would you say was the first time you observed the jerking of this elevator on this voyage?

THE COURT: Escalator.

MR. SCHWARTZ: Escalator. I am sorry.

1 AP 9 Guyon - direct

2 months.

3 A Possibly the end of April, beginning of May. As  
4 I say, they were very, very fast trips. We were out eight  
5 days and came in and sailed the next morning and what-not.  
6 It was very fast and a lot of confusion.

7 Q Now, did you yourself complain to anybody about  
8 this condition?

9 A Yes.

10 Q To whom?

11 A Well, I reported this at the bell station, and in  
12 several occasions I myself brought what I call repair slips  
13 to the electricians about the escalator jerking and being  
14 unsafe.

15 Q Would you have an approximation of when was the  
16 first time you so reported and when would be the last time  
17 since you have been on that ship?

18 A Well, I personally, the day before Mr. O'Hara's  
19 accident, on my way back to the electrician's quarters to  
20 report such a repair, complaints about the escalator.

21 Q That would be a day before?

22 A The day before. That's the only -- And I met one  
23 of the assistant electricians in the same passageway. We  
24 are talking about the same passageway which the dining room  
25 is on. And I was on my way aft, and I met the electrician



A-17

1 MP 10 Guyon - direct

2 there carrying a wooden box with some light bulbs in there,  
3 and he was in the process of changing light bulbs around the  
4 vessel, and I told him that I nearly fell down on the escal-  
5 ator, and if he would please go over and check it. So he  
6 told me, he says, "Look: that's not my job. I have nothing to  
7 do with it."

8 So I says, "Well, I thought you were the electrician.  
9 I have a repair slip made out."

10 He says, "Look: there's only one here that can  
11 monkey with the escalator. That's the chief electrician."  
12 He says, "I don't want to hear anything about the escalator.  
13 It's too much of a headache, please." He says, "Go and see  
14 the chief."

15 I says, "Where's the chief?" He says, "I don't  
16 know. He works on the vessel somewhere."

17 So I said, "If I leave the repair slip in the usual  
18 place, the box there, will it be taken care of? It's quite  
19 bad."

20 So he says, "Look: you do what you want. I got my  
21 job. You got yours." And that was the end of it.

22 Q About how long before the accident was this, roughly?

23 A That was the afternoon before.

24 Q But you had made other complaints outside of that?

25 A Yes. Every time I got on the escalator and it jerked.

1 MP 11 Guyon - direct

2 I made a slip, a repair slip, and in turn brought the same  
3 sheet back to the electrician repair box, which is 'way at the  
4 other end of the vessel than the same passageway.

5 Q And that was before this conversation that you had  
6 with the electrician, or whatever he was?

7 A Correct. They were very short voyages, as I said,  
8 Mr. Schwartz.

9 Q Now, what kind of worker was Mr. O'Hara?

10 A He was a very, very efficient, and in his field  
11 he was very, very good.

12 Q Now, while you were on this ship for about a month  
13 and a half to two months, Mr. O'Hara had been working on this  
14 ship?

15 A Yes; he had been on the vessel.

16 Q Now, during that time, did Mr. O'Hara ever complain  
17 about his back or head?

18 A No. Not --

19 MR. REILLY: To him?

20 Q To you or anybody else?

21 A No.

22 MR. REILLY: Objection.

23 THE COURT: Well, he said no, he didn't.

24 THE WITNESS: No, sir. No, your Honor.

25 THE COURT: We will let it stand.



1 Q Did you observe any difficulty or anything unusual  
2 in the way Mr. O'Hara worked while he was on there, on this  
3 ship, working, as far as bending, or his back or anything was  
4 concerned?  
5

6 A No. I never observed Mr. O'Hara doing anything  
7 noticeable of that sort, no.

8 Q Now, did you have occasion to see Mr. O'Hara after  
9 this accident?

10 A Yes.

11 Q During the time that you saw him after the accident,  
12 what if anything did you observe about him, about his back?

13 A I met him, I believe, two times, where we exchanged  
14 words, where we spoke, and on the first occasion -- it might  
15 have been the summer of 1970, and we started a conversation.  
16 I don't recall what we were talking about exactly, and I find  
17 him a different person. I mean, back in 1970 already he was  
18 not his usual self. He seemed -- I don't know -- depressed,  
19 you know, and he walked kind of slow. It's not the same per-  
20 son that I worked with on the S/S Brasil, when I remember  
21 where he used to show some of the people how to handle pass-  
22 engers and serve wine and which wine will go with which food,  
23 you know, the various kinds of food. He was a different fellow  
24 altogether.

25 And the last time I saw him, then, was around

1           October of this year, and we started a conversation, and I  
2           was telling Mr. O'Hara that I brought my family to Port-au-  
3           Prince, Haiti, for vacation, my wife and young baby, and we  
4           were talking about the island and everything, and all of a  
5           sudden he started to talk about how New York was unsafe and  
6           how he was sometimes doubtful to go out in the evening and  
7           so on, which has nothing to do with what we were talking about.  
8           I was talking about Haiti with him.

9                       And all of a sudden, he stopped talking for about  
10           a -- you know, for a little moment or so, and like if he was  
11           searching for words, and then when he started the conversa-  
12           tion again he was talking about an entirely different sub-  
13           ject.  
14

15                      So I says, "Are you all right?" "Oh," he says,  
16           "I'm fine," he says, and everything.

17                      I says -- Well, I didn't want to tell him what my  
18           thoughts were, but I could see that he was getting --

19           Q       Let me ask you this:

20                      Did you ever notice this before when in talking to  
21           him he stopped talking, you say, for about a minute or half a  
22           minute or something like that? Is that what you said?

23           A       Yes; for a long moment.

24           Q       And then went on to something?

25           A       And then went on to an entirely different subject.



\*\*\*

1 MP 16 Guyon - cross

2 We spoke on the telephone.

3 Q Did you see him in 1972?

4 A No; we didn't.

5 MR. REILLY: Thank you.

6 MR. SCHWARTZ: That's all.

7 THE COURT: You are excused, Mr. Guyon. Thank you  
8 very much.

9 THE WITNESS: Thank you, your Honor.

10 (Witness excused.)

11 THE COURT: I believe the witness next is Mr.  
12 Scott.

13 R A N D O L P H B E R N A R D S C O T T , called as  
14 a witness by the plaintiff, being first duly sworn,  
15 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. SCHWARTZ:

18 Q Mr. Scott, on May 21, 1969, by whom were you  
19 employed?

20 A Moore-McCoamack Steamship Company.

21 Q And on that day, where were you working?

22 A In the galley, called the kitchen. The galley.

23 Q On what particular ship were you working?

24 A On the Brasil.

25 Q And how long had you been working on this ship

1 MP 17 Scott - direct

2 before May 21, 1969?

3 A A little over two years.

4 Q On May 21, 1969, what was your position?

5 A Chief utility.

6 Q On that day, did you see Mr. O'Hara?

7 A Yes; I did.

8 Q And that day, did you notice something happened  
9 to him while you were on the ship where you were working?

10 A Yes.

11 Q First, about what time was this?

12 A Approximately eleven-something. After eleven.

13 THE COURT: What was that: in the morning?

14 THE WITNESS: Yes, Judge.

15 THE COURT: Thank you.

16 Q And what did you notice, hear, see and do? At  
17 that time, what did you notice about Mr. O'Hara and what did  
18 you do?

19 A At that time, I heard a noise, and when I looked  
20 back where I was standing, I saw Mr. O'Hara midway on the  
21 escalator, and all the glasses crumbled between the escalator  
22 and the retort wheels that they had. So I run up the  
23 escalator and cut the escalator off.

24 Q When you say you cut the escalator off, you cut off  
25 the power so it doesn't move?



A-23

1 MP 18 Scott - direct

2 A I cut the switch off with a key, so it stopped in-  
3 stantly.

4 Q Now, when you saw Mr. O'Hara, was he conscious or  
5 unconscious?

6 A He was lying on his back at the foot of the escal-  
7 ator.

8 Q Did you notice whether he was conscious or uncon-  
9 scious?

10 A He wasn't saying anything.

11 Q Did he move?

12 A No.

13 Q After you cut off the power of that escalator, what  
14 did you do?

15 A I run back down, the opposite one, run down.

16 Q Yes?

17 A And I pulled him away from the flat way he was  
18 lying on his back.

19 Q After you pulled him away, did anybody else come  
20 over?

21 A Yes.

22 Q Who?

23 A I have another one of the workers helped me move  
24 him and put him on the side of a table, a steel table, a  
25 dresser.

A-24

1 MP 19 Scott - direct

2 Q Did any --

3 MR. SCHWARTZ: I withdraw that.

4 A Then there was --

5 Q Then where was he taken, after that?

6 A The Second called the doctor, and he came with a  
7 wheel chair in the galley and took him down to the hospital.

8 Q Was he put in the wheel chair?

9 A Yes.

10 Q Now, directing your attention to a period of time  
11 before the accident of May 21, 1969, at any time, whether  
12 that day or before that day, had you ever noticed anything  
13 about this escalator?

14 A Yes.

15 Q What?

16 A It had many, many instances concerning the escalator.  
17 It bumps, and the waitresses tumbled on the escalator.  
18 Some fell, some trays fell, and it's always out of order, I  
19 should say.

20 Q Now, is that the up escalator?

21 A The --

22 Q The one going up from the galley to the dining room?

23 A The one going up from the galley to the dining  
24 room, and on the other side, one comes down.

25 Q And the escalator that we are talking about --



A-25

1 MP 20

Scott - direct

2 A -- is the one going up.

3 Q -- which was jerking with the girls falling, is  
4 the one going up?

5 A Yes.

6 Q Now, about when would you say was the last time  
7 before this occurrence that you noticed this escalator  
8 shaking or jerking or whatever words you were using?

9 A A couple of weeks before the incident with O'Hara.

10 Q And about when would you say was the first time  
11 you noticed it?

12 A A few months prior to that time.

13 Q Did you ever complain to anybody about the escala-  
14 tor?

15 A Yes.

16 Q Whom did you complain to about it?

17 A As a matter of fact, they complained to me, because  
18 I am in charge of that area, and in turn I complained to the  
19 electrician.

20 Q What electrician was that?

21 A The chief electrician.

22 Q And when would you say would be the --

23 MR. SCHWARTZ: I withdraw that.

24 Q How many times would you say you complained about  
25 that?

1 MP O'Hara - direct

98

2 A Before noon.

3 Q On what part of the ship did it happen?

4 A On the escalator.

5 Q What were you doing at the time?

6 A I was carrying glasses to the dining room, from the  
7 galley to the dining room.

8 Q How were you carrying the glasses?

9 A On a rack.

10 Q Will you tell the Court and jury what if anything  
11 occurred while you were on the escalator?

12 A The escalator was jerking.

13 Q What happened?

14 A I lost my balance, and I fell. I think -- I was  
15 ejected from the escalator.

16 Q Did you fall backwards?

17 A Backwards; yes, sir.

18 Q What happened to you after you fell?

19 A I was knocked unconscious, so --

20 Q Now, what is the first thing you knew when you  
21 regained consciousness?

22 A They carried me on the wheel chair to the ship  
23 hospital.

24 Q Was a doctor there at that time?

25 A There was a lot of people. There was a nurse,



1 MP O'Hara - direct

2 doctors and --

3 Q Now, as far as this escalator was concerned, about  
4 when was the last time before this accident, if ever, that  
5 this escalator jerked, as far as you know?

6 A We had a lot of trouble with it.

7 Q As far as you know --

8 MR. REILLY: I move to strike the answer.

9 THE COURT: Strike it. Erase the answer from  
10 your minds, ladies and gentlemen of the jury. The reason  
11 I tell you that is that it does not respond to the pending  
12 question.

13 MR. SCHWARTZ: I will withdraw the question and put  
14 it this way:

15 Q First, before your accident, did you ever see this  
16 elevator jerk before?

17 A Yes, sir.

18 Q All right. About when would you say was the first  
19 time before the accident that you --

20 A A couple of days before that.

21 Q Was that the first time or the last time?

22 A The last time I saw it.

23 Q About when was the first time, approximately?

24 A When I started on the ship, in October.

25 Q Did you ever complain to anybody about the jerking

1 MP O'Hara - direct

100

2 of the --

3 A Yes.

4 Q To whom?

5 A To the head waiter and the dining room manager.

6 Q Now, coming back to the time of the occurrence,  
7 when you came to, I think you said you were in a wheel chair,  
8 being put in a wheel chair; is that correct?

9 A Yes, sir.

10 Q Where were you taken?

11 A To the ship's hospital.

12 Q What if any part of your body was hurt?

13 A My head, my back and my knee.

14 Q When you were taken to the ship's hospital, what  
15 was done for you?

16 A They gave me medicine.

17 Q About how long were you there?

18 A Until the night, the same day. They asked me if I  
19 wanted to go to my quarters, so they sent me at night to my  
20 quarters.

21 Q And the next day, did you receive any further treat-  
22 ment?

23 A Yes. I had to report to the doctor every day.

24 Q Now, after the ship docked, did you go to any hos-  
25 pital?



1 mp:mg 90

Miller-direct

2 Q Would you tell the Court and jury briefly about  
3 your maritime background, licenses and experience?

4 A Well, I was with the Moore-McCormack Lines from  
5 1947 until 1969.

6 I sailed as chief electrician on the old ships  
7 and they assigned me to new construction when they built  
8 the S. S. Brasil.

9 I went to Pascagoula in 1957, April, and boarded  
10 the ship in 1958 when she was commissioned and I remained  
11 there as electrical engineer until she laid up.

12 Q And what did your duties of electrical engineer  
13 consist of?

14 A Supervision of all the electrical equipment,  
15 repair and maintenance of that equipment on board the  
16 vessel.

17 Q Including the ship's escalators?

18 A Escalators, elevators and everything involved.

19 Q How many escalators did the Brazil have?

20 A Two.

21 MR. REILLY: Would you mark these photographs  
22 for identification, please.

23 (Defendant's Exhibits J-1 and J-2 marked for  
24 identification.)

25 MR. REILLY: These are photographs, your Honor.

1 mp:mg 100

Miller-direct

2 and he was not.

3 THE COURT: You were one of the ship's officers?

4 THE WITNESS: That is correct.

5 THE COURT: And he was like a petty officer?

6 THE WITNESS: That's right.

7 THE COURT: And he was under you?

8 THE WITNESS: That is correct.

9 Q Would you tell the Court and jury what complaints,  
10 if any, you received with regard to jerking movements of  
11 the steps of the escalator?

12 MR. SCHWARTZ: May I inquire whether this ques-  
13 tion pertains to those delivered to him personally or  
14 includes the complaint box that he is talking about?

15 THE COURT: I think anything he knows about it  
16 would be pertinent.

17 MR. SCHWARTZ: Well, the way the question was,  
18 it wasn't clear.

19 THE COURT: Well, let's make sure it is clear.  
20 I would like that covered, anything he knows about in the,  
21 way of complaints.

22 Q Would you tell us anything you might know about  
23 complaints directed to these escalators, with regard to the  
24 jerking of the steps?

25 A To my knowledge, I know of no complaints the



1 mp:mq 102

Miller-cross

2 A In charge of all equipment aboard the S. S. Brasil.

3 Q Just what did you do?

4 A Necessary maintenance and repair.

5 Q Did you go out and do repairs yourself or was  
6 there somebody under you?

7 A No. There was somebody under me.

8 Q Who was under you?

9 A The chief electrician.

10 Q How many?

11 A Chief electrician, first electrician and second  
12 electrician.

13 Q Now, this complaint box that was in existence,  
14 there was such a box, is that right?

15 A Yes, there was.

16 Q Where was it kept?

17 A In the electrical shop.

18 Q When the complaints were put into that box, who  
19 took them out?

20 A The chief electrician or myself.

21 Q How often would you take them out?

22 A Whenever they came in.

23 Q You mean, if I put one in there at one o'clock  
24 you would take it out at five after one?

25 A In all likelihood, yes.



1 mp:mg 104

Miller-cross

2 depending on the number of slips.

3 Q You say that you don't know of any defects in  
4 this-- or defects or complaints concerning defects in  
5 this elevator jerking or moving? You say none of that  
6 took place?

7 A That's exactly right.

8 Q Let me see if I understand it.

9 You say that none of this was called to your  
10 attention or none of this took place?

11 A It was never called to my attention.

12 Q Would you say none of this took place?

13 A I have no way of knowing.

14 Q Tell me: If somebody is hurt on that escalator,  
15 would that come to your attention?

16 A It would if it would ever happen.

17 Q It would?

18 A Yes.

19 Q Did Mr. O'Hara's accident come to your atten-  
20 tion?

21 A It did not.

22 Q Other people were injured on that escalator,  
23 weren't they?

24 A Not on the escalator.

25 Q I am talking about the escalator --

A I am talking about the escalator. No one was injured on that escalator.

THE COURT: As far as you know?

THE WITNESS: As far as I know, yes, sir.

Q Now, was that escalator ever repaired?

A Routinely, yes. Routine maintenance.

Q What do you mean by that?

A Excuse me, what kind of repair?

THE COURT: He asked you, was it ever repaired?

THE WITNESS: All the equipment on the ship was repaired and so the escalators were, of course.

Q I asked you a question and you said routinely. I asked you what you mean by routine.

A Well, routinely repaired the escalators, worn parts would be replaced, anything else like that.

Q Are you telling me now that you look at that escalator and repair parts when there is nothing wrong?

A Well, certainly. We repair it before it goes wrong.

Q And how often would you do that?

A Whenever we had time. Usually when we were in port in New York, because Otis Elevator had a service contract and they were on board every trip to check the equipment.



1 mp:mg 108

Miller-cross

2 Q And if the main drive motor is defective in any  
3 way, that main drive would in turn affect the operation  
4 of the escalator, wouldn't it?

5 A Only to stop.

6 Q What about going?

7 A Well, either it goes or it doesn't go.

8 Q Well, it can go and stop, can't it?

9 A No, it can't.

10 Q In other words, it only has to do with stopping?

11 A When it stops, someone has to intentionally  
12 restart it.

13 Q That is the part that you took care of?

14 A What?

15 Q What we were just talking about.

16 A The starting?

17 Q You just said you took care of that switch.

18 THE COURT: The phase reversal switch.

19 THE WITNESS: That's part of it. I supervised  
20 it. I didn't take care of it personally.

21 Q And what else did you do in the way of repairs  
22 on that escalator?

23 A That's a very broad scope. It is hard to re-  
24 member what we did. They were all very minor things.

25 THE COURT: Did you keep a repair log or record?



1 mp:mg 109

Miller - cross

2 THE WITNESS: On board the vessel; yes, sir.

3 THE COURT: Who made the entries in that repair  
4 log or record?

5 THE WITNESS: I did.

6 Q Do you have it?

7 A No, I haven't.

8 Q What did you do with it?

9 A I have no idea. It was left aboard the vessel.

10 Q When was it left aboard the vessel?

11 A In 1969, when they laid the vessel up.

12 Q Would you say that the functioning of the es-  
13 calators was your responsibility?

14 A Right, yes.

15 Q Could those escalators stop while in motion?

16 A Certainly they can stop; with any power inter-  
17 ruption, they would stop.

18 Q In regard to J-2 for identification -- oh, it  
19 is in evidence-- J-2 in evidence, who had the key to that?

20 A I had a key. The chief electrician had a key,  
21 and the dining room matron had a key.

22 MR. SCHWARTZ: That's all of this witness.

23 MR. REILLY: Nothing further.

24 Thank you, Mr. Miller.

25 (Witness excused.)

1 mp:mg 113

Steel-direct

2 particularly with this complaint of stopping and starting?

3 MR. SCHWARTZ: I object to the form of that.

4 THE COURT: Well, the form I think is objection-  
5 able.

6 Perhaps you could break it down into shorter  
7 questions rather than just asking for these general com-  
8 ments.

9 Q Assume if you will, Mr. Steel, that this es-  
10 calator came to a stop, what, if anything, would then  
11 have to be done to get it moving again?

12 A The escalator is started by means of a key  
13 switch. The switch is present at each landing of the  
14 escalator on the balustrade. This is our standard  
15 installation.

16 I don't know as far as this particular instal-  
17 lation. On occasion there are special features in a  
18 contract that have a switch placed at a remote area.  
19 However, the only way you can start the escalator is with  
20 a key inserted in the switch.

21 Q Well, if it were to stop for two seconds could  
22 it start again without this turning of the switch?

23 A No, sir.

24 Q Why not?

25 A Well, stopping the escalator, the motor is



1 MP Esposito - direct

2 A Yes; I do.

3 Q Did you see Mr. O'Hara on July 10th of 1971?

4 A Yes; we did, at 12:40 p.m.

5 Q And where did you see Mr. O'Hara?

6 A He came out of his house and went to the super-  
7 market.

8 Q And then?

9 A He came out of the store, carrying a medium-sized  
10 bag, and proceed to a stationery store across the street and  
11 purchased a newspaper and then returned home.

12 Q And would you describe Mr. O'Hara's walk as you saw  
13 him on July 10th of 1971?

14 A He walked in a normal manner, with no apparent  
15 physical difficulty.

16 Q Did you go to Mr. O'Hara's residence again in July  
17 of 1971?

18 A Yes, sir.

19 MR. SCHWARTZ: I object to counsel leading the wit-  
20 ness.

21 THE COURT: Yes. Please don't lead after this.

22 Q Yes, sir --

23 A On July 26, 1971. Mr. O'Hara wasn't seen on this  
24 date.

25 Q When did you next go?



1 MP Esposito - direct

455

2 346 West 17th Street.

3 Q And how did he go there?

4 A By train.

5 Q Did you observe him as he walked along that day?

6 A Yes; I did.

7 Q And as he climbed the staire of the subway?

8 A Yes; I did.

9 Q And will you tell us -- would you describe his walk  
10 for us that day?

11 A He walked in a normal manner, with no apparent  
12 physical difficulty.

13 Q When did you last see him on that day?

14 A At ten-thirty a.m.

15 Q Where was he then?

16 A In the building of the National Maritime Union.

17 Q When did you next go to Mr. O'Hara's residency?

18 A On October 27, 1971.

19 Q Was he seen on that day?

20 A No; he was not.

21 Q When did you next go to Mr. O'Hara's residence?

22 A On November 5, 1971.

23 Q Was he seen on that day?

24 A Yes; he was.

25 Q And where was he seen on that day?

1 MP Esposito - direct

2 THE COURT: And someone else continued on?

3 THE WITNESS: That's right.

4 THE COURT: And you didn't see him after you dropped  
5 out?

6 THE WITNESS: Yes; I did. I followed in a car.

7 THE COURT: You followed in an automobile and kept  
8 him under constant observation?

9 THE WITNESS: Not every second. He was blocked some-  
10 times by trucks and cars, but most of the time he was in my  
11 sight until the hall -- until the union hall.

12 Q When did you next go to Mr. O'Hara's apartment?

13 A August 10, 1973.

14 Q Was he seen on that date?

15 A No; he was not.

16 Q When did you next go?

17 A September 27, 1973.

18 Q Was he seen on that date?

19 A Yes; he was.

20 Q Would you describe his walk on that date?

21 A He was using a cane and walked with a noticeable  
22 limp.

23 Q When did you next see Mr. O'Hara?

24 A On October 18, 1973.

25 Q And would you describe his walk on that day?



1 COURT CHARGE  
MP

A-40  
\*\*\*

2 MIKE O'HARA

487

3 VS

70 Civil 4011

4 MOORE-McCORMACK LINES, Inc.

6 New York, N. Y.

7 January 8, 1974 - 1:45 p.m.

8 CHARGE OF THE COURT

9 THE COURT: (Ward, D. J.) Madam Forelady, ladies  
10 and gentlemen:

11 It is the custom in our court for the juror seated  
12 in Seat Number 1 to be your foreman or, in this case, your  
13 forelady, and Mrs. Lerner will serve in that capacity. The  
14 function of the foreman or forelady is to sit at the head  
15 or first place at the table and take the vote of the jurors  
16 as it is being given and also, should the jury have something  
17 they wish to ask the Court, that is, if you wish to have  
18 any portion of the testimony read to you or if you wish to  
19 see any of the exhibits or if you wish to have any portion of  
20 my charge read back to you, your forelady will write a note  
21 to the Court. I will receive the note while you are still in  
22 your jury room; I will open it; I will read its contents to  
23 counsel, and to the extent we can comply with your question  
24 or request we shall do so as promptly as possible.

25 Members of the jury, we come now to that portion of



1 MP

2 the trial where you are instructed in the law applicable to  
3 the case. You will then retire for your final deliberations.

4 You have now heard all the evidence introduced by  
5 both sides and through arguments of their respective attorneys  
6 you have learned the conclusions which each party believes  
7 should be drawn from the evidence presented to you.  
8

9 A lawsuit is a civilized method of determining  
10 differences between people. It is basic to the administration  
11 of any system of justice that the determination on both the  
12 law and the facts be made fairly and honestly.

13 You as the jurors and I as the Judge have a heavy  
14 responsibility to assure that a just result is reached in  
15 the determination of the differences between the plaintiff and  
16 the defendant in this case.

17 As the jurors, your fundamental duty is to determine  
18 from all the evidence that you have heard and the exhibits  
19 which have been admitted into evidence what the facts are.  
20 You are the sole and exclusive judges of the facts. In that  
21 field you are supreme, and neither I nor anyone else may  
22 invade your province.

23 On the other hand, and with equal emphasis, I charge  
24 you that you are bound to accept the law in the case as it  
25 is given to you in this charge and in any instructions that  
I have given to you during the course of the trial. Whether

1       MP  
2       you agree with the law as given to you by the Court or not,  
3       you are still bound by it.

4               The process by which you arrive at a verdict is  
5       first to determine from all of the evidence and the exhibits  
6       what the facts are and second, to apply the law of the case,  
7       as I give it to you, to the facts as you have determined them  
8       to be. The conclusion thus reached will be your verdict.

9               I have endeavored to preside impartially and not to  
10       express an opinion one way or the other as to what you should  
11       find the facts to be. In the course of the trial it has been  
12       necessary for me to rule on the admission of evidence and on  
13       motions made with respect to the applicable law. You must not  
14       infer from any such ruling which I have made or from anything  
15       that I have said during the course of the trial that I hold  
16       any views for or against either of the parties to the law  
17       suit or for or against any of the attorneys in the case. My  
18       views of mine would, in any event, be totally irrelevant,  
19       since it is your recollection of the evidence and your deter-  
20       mination of the issues of fact which controls.

21               At times during the trial I have sustained objec-  
22       tions to questions which were asked, without permitting the  
23       witness to answer or, on occasion, when an answer was made,  
24       I instructed that it be stricken from the record and that you  
25       disregard it and erase it from your minds. You may now draw



1 MP

2 any inference from an unanswered question nor may you con-  
3 sider testimony which has been stricken in reaching your de-  
4 cision.

5 The law requires that your decision be made solely  
6 upon the competent evidence before you. Such items as I  
7 have excluded from your consideration were excluded because  
8 they were not legally admissible. The law does not, however,  
9 require you to accept all of the evidence I have admitted,  
10 even though it be competent. In determining what evidence  
11 you will accept you must make your own evaluation of the  
12 testimony given by each of the witnesses and determine the  
13 degree of weight you choose to give to that particular wit-  
14 ness' testimony.

15 The testimony of a witness may fail to conform to  
16 the facts as they occurred because he is intentionally telling  
17 a falsehood or because he did not accurately see or hear that  
18 about which he testified or because his recollection of the  
19 events is faulty or because he has not expressed himself  
20 clearly in giving his testimony.

21 There is no magic formula by which one may evalu-  
22 ate the testimony. You bring with you to this courtroom all  
23 of your experience and the background of your lives. You  
24 bring your common sense. You are going to take your common  
25 sense with you into the jury room, and I do hope that when



1 MP  
2 you return from your deliberations you will still have your  
3 common sense with you at that time.

4 In your everyday affairs, you determine for your-  
5 selves the reliability or unreliability of statements made  
6 to you by others. The same tests that you use in your every-  
7 day dealings are the tests which you apply in your delibera-  
8 tions.

9 The interest or lack of interest of any witness in  
10 the outcome of this case, the bias or prejudice of a witness,  
11 if there be any, the appearance, the manner in which the  
12 witness gave his testimony on the stand, the opportunity  
13 that the witness had to observe the facts concerning which  
14 he testified, the probability or improbability of the wit-  
15 ness' testimony when viewed in the light of all the other  
16 evidence in the case are all items to be taken into your con-  
17 sideration in determining the weight if any you will assign  
18 to that witness' testimony.

19 If such considerations make it appear that there  
20 a discrepancy in the evidence, you will have to consider  
21 whether the apparent discrepancy may not be reconciled by fit-  
22 ting the two stories together. If, however, that is not  
23 possible, you will then have to determine which of the con-  
24 flicting versions you will accept.

25 The plaintiff testified before you as a party to

1 the action. He is an interested witness. That a witness is  
2 interested in the outcome of the case does not mean that  
3 he has not told the truth. It is for you to determine from  
4 his demeanor on the stand and such other tests as your experi-  
5 ence dictates whether or not his interest is such that he is  
6 likely, unintentionally or otherwise, to color his testimony.  
7 You are at liberty, if you deem it proper under all of the  
8 circumstances to do so, to disbelieve the testimony of such a  
9 witness, even though it is not otherwise impeached or contra-  
10 dicted. However, you are not required to disbelieve such a  
11 witness, and you may accept all or such part of his testimony  
12 as you deem reliable and reject such part as you deem unworthy  
13 of acceptance.

14 There were two types of witnesses who testified in  
15 this case. There were so-called fact witnesses, and also  
16 there were expert witnesses. I should like to comment brief-  
17 ly relative to the latter: the expert witnesses.

18 You will recall that Drs. Koven, Freiman, Kershen-  
19 baum and Balensweig gave testimony concerning their qualifi-  
20 cations as experts in the field of orthopedics and neurology, in  
21 the field of medicine. When a case involves a matter of  
22 science or art, requiring special knowledge or skill not  
23 ordinarily possessed by the average person such as ourselves,  
24 an expert is permitted to state his opinion for the informa-  
25 tion of the Court and the jury.



MP

493

1           The opinion stated by each expert who testified  
2 before you was based on particular facts as the expert him-  
3 self observed them and testified to them before you or as the  
4 attorney in questioning the expert asked him to assume. You  
5 may reject an expert's opinion if you find the facts to be  
6 different from those which formed the basis for the opinion.  
7 You may also reject his opinion if after careful consideration  
8 of all the evidence in the case, expert or other, you dis-  
9 agree with the opinion. In other words, you are not required  
10 to accept an expert's opinion to the exclusion of the facts  
11 and circumstances disclosed by other testimony. Such an  
12 opinion is subject to the same rules regarding reliability as  
13 the testimony of any other witness. It is given to assist  
14 you in reaching a proper conclusion and is entitled to such  
15 weight as you find the expert's qualifications in his field  
16 warrant and must be considered by you but is not controlling  
17 upon your judgment.

18           You may accept the testimony of the experts; you may  
19 give it great weight; you may give it little weight; you may  
20 reject it or give it no weight.

21           You heard on at least one occasion counsel entering  
22 into a stipulation. This had to do with the life expectancy  
23 of the plaintiff. I will get back to that matter a little  
24 later, but where all parties stipulate to a certain fact,  
25

MP

where all parties agree to that fact, that matter or those matters are undisputed, and you should accept the stipulations as accurate.

Additional examples are:

The parties stipulated that the plaintiff, on May 21, 1969, was employed by the defendant aboard the S/S Brasil as a wine steward and that the defendant, Moore-McCormack Lines, Inc. on May 21, 1969 owned and operated the S/S Brasil.

Aside from these stipulations, which you shall accept as accurate, there are other facts which are in conflict, and it is for you, the jury, to determine which of these conflicting facts you accept and which you reject. As I have said, that is your sole province. You are exclusive judges of the facts.

We have a general doctrine relative to the testimony of witnesses that I have adverted to but I should like to cover briefly at this time. It is the doctrine of "falsus in uno, falsus in omnia", coming from the Latin. Basically, it means this: If you find that any witness has wilfully testified falsely as to any material fact, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is quite likely to testify falsely about every-



1 thing. You are not required, however, to consider such a  
2 witness as totally unworthy of belief. You may accept so  
3 much of his testimony as you deem true and disregard what  
4 you feel is false.  
5

6 By the processes which I have just described to  
7 you, you as the sole judges of the facts determine which of  
8 the witnesses you will believe, what portion of their testimony  
9 you will accept and what weight you will give to it.

10 I would like to speak now about something called  
11 the burden of proof. The burden of proof rests here on the  
12 plaintiff, Mr. O'Hara. That means that the plaintiff must  
13 establish his claim by what is called a fair preponderance  
14 of the credible evidence. The credible evidence means the  
15 testimony or exhibits that you find to be worthy to be be-  
16 lieved. A preponderance means the greater part of such  
17 evidence. That does not mean the greater number of witnesses  
18 or the greater length of time taken by either side. The  
19 phrase refers to the quality of the evidence, that is, its  
20 convincing quality, the weight and the effect that it has on  
21 your minds.

22 The law requires that in order for the plaintiff to  
23 prevail the evidence that supports his claim must appeal to  
24 you as more nearly representing what took place than that  
25 opposed to his claim. If it does not or if it weighs so

1 MP  
2 evenly that you are unable to say that there is a preponder-  
3 ance on either side, then you must resolve the question in  
4 favor of the defendant. It is only if the evidence favorable  
5 to the plaintiff's claim outweighs, albeit it by a little  
6 bit, the evidence opposed to it that you can find in favor of  
7 the plaintiff.

8 As you will recall, the plaintiff was a seaman and  
9 a member of the crew of the S/S Brasil, owned by the defend-  
10 ant, Moore-McCormack Lines, Inc. In this suit he asserts  
11 two separate claims. The first of these is for negligence  
12 under the Jones Act, and the second is for unseaworthiness  
13 under the General Maritime Law.

14 These claims should be considered separately by  
15 you. The plaintiff may be entitled to recover if he establishes  
16 either claim.

17 You will note at this time that the verdict form  
18 which you will take with you into the jury room as its first  
19 two questions treats with first the matter of unseaworthiness  
20 Question 1; second, the matter of negligence, in Question 2.  
21 I think you will be able to follow the verdict form very  
22 readily, and it will be available and will serve as a guide  
23 and an outline to you as you consider the case.

24 The defendant denies that it was negligent or that  
25 it violated any duty it owed Mr. O'Hara. In addition, it



claims that Mr. O'Hara caused or contributed to his own injury.

Let us first consider the plaintiff's claim for negligence under the Jones Act.

In order to recover, the plaintiff must prove that his employer was negligent, and the question you must first ask therefore is: what is negligence? Negligence is the doing of some act that a reasonably prudent person would not do or the failure to do something that a reasonably prudent person would do under the same or similar circumstances. It is, in other words, the failure to use ordinary care under the circumstances. The mere occurrence of an accident, of course, does not raise any presumption of negligence.

The obligation of a ship owner under the Jones Act for the safety of seamen is substantially greater than that of an ordinary employer to his employees. The word "negligence" therefore, as used in the Jones Act, which makes the employer of seamen liable for his negligence, must be given a liberal interpretation. It includes any breach of any obligation that the employer owes to the seamen, including the obligation of seeing to the safety of the crew.

Under the Jones Act, if the employer committed some act or omission that played any part, no matter how small, in actually bringing about or causing injury to Mike O'Hara,

1 MP  
2 then you should find that the employer was negligent.

3 Negligence under the Jones Act may consist of a  
4 failure to comply with a duty required by law. The employers  
5 of seamen have a legal duty to provide their employees with a  
6 safe place in which to work. If you find that in this case  
7 the plaintiff was injured because the defendant failed to  
8 furnish him with a reasonably safe place to work and that  
9 the plaintiff's working conditions could have been made safe  
10 through the exercise of reasonable care, then you may find  
11 that the defendant was negligent.

12 An employer is legally responsible for the negli-  
13 gence of its employees while acting within the course and  
14 scope of their jobs. It is not necessary to show that the man-  
15 agement or officers of the employer company were themselves  
16 negligent in any way for it to be responsible.

17 Plaintiff also seeks to recover damages from the  
18 defendant because of the claimed unseaworthiness of the  
19 defendant's vessel, the S/S Brasil. The owner of a vessel  
20 has a duty to provide a vessel that is reasonably fit for its  
21 intended use, and this duty extends not only to the vessel  
22 itself but to all of its parts and equipment.

23 The duty to provide a seaworthy ship is absolute.  
24 The owner may not delegate that duty to anyone. If he does  
25 not provide a seaworthy vessel, then no amount of due care or



1       MP  
2       prudence excuses him, whether or not he knew or could have  
3       known of the deficiency.

4               The duty to provide a seaworthy vessel requires that  
5       the vessel must be reasonably fit for its intended purpose and  
6       that the vessel, its gear, appurtenances and operation must  
7       be reasonably safe. The duty to provide a seaworthy vessel  
8       includes the duty to supply an adequate and competent crew.  
9       Even though the vessel owner provides a numerically adequate  
10      crew, the vessel may still be unseaworthy if too few men are  
11      assigned to a given task.

12              If you find, therefore, that the owner of this  
13      vessel did not provide an adequate crew or sufficient man-  
14      power to perform the tasks required, or if you find that the  
15      vessel was in any way unsafe or in any manner unfit or if  
16      you find that too few men were assigned to a given task, then  
17      you may find that the vessel was unseaworthy and the ship  
18      owner liable, without any reference to the issue of negligence  
19      of the defendant or any of its employees.

20              The owner of a vessel is not, however, required to  
21      furnish an accident-free ship. Its duty is only to furnish a  
22      vessel and appurtenances reasonably fit for their intended  
23      use and a crew that is reasonably adequate in numbers for  
24      their assigned tasks.

25              A vessel is not called on to have the best of

1 applicances and equipment or the finest of crews but only  
2 such gear as is reasonably proper and suitable for its in-  
3 tended use and a crew that is reasonably adequate.

4  
5 If you find, therefore, that the defendant had a  
6 capable and competent crew and appliances and gear that were  
7 safe and suitable for their intended use, then the vessel  
8 cannot be said to have been unseaworthy, and the defendant is  
9 entitled to a verdict on this cause of action.

10 It is not a valid defense to a suit like this one  
11 to contend that the injured seaman assumed the risk of his  
12 employment if the injury resulted, in whole or in part, from  
13 the negligence of the owner of the vessel or any of its  
14 officers, agents or employees, but the employer is not liable  
15 merely because a seaman has been injured. The employer is  
16 liable only if it has been negligent or has failed to provide  
17 a seaworthy vessel. If a seaman is injured as a result of  
18 the normal hazards or risks of the business in which he is  
19 engaged, without fault on the part of anyone else and despite  
20 the fact that the ship and its equipment were seaworthy, he  
21 is not entitled to recover damages from his employer.

22 We next consider the matter referred to in the law  
23 as causation.

24 Not every injury that follows an accident necessarily  
25 results from it. If I am in an automobile accident today and



1 get a cold tomorrow, that does not mean my cold is a result  
2 of the automobile accident. In this respect, a different rule  
3 applies to proof of causation under the Jones Act than the  
4 rule applicable to a claim of unseaworthiness.  
5

6 Under the Jones Act, an injury or damage is con-  
7 sidered caused by an act or failure to act whenever it  
8 appears from a preponderance of the evidence that the act or  
9 omission played any part, no matter how small, in bringing  
10 about or actually causing the injury or damage. However,  
11 with respect to the unseaworthiness claim, it is necessary  
12 for the plaintiff to show not only that the act or omission  
13 played a substantial part in bringing about or actually caus-  
14 ing the injury to him, but also that the injury was either  
15 a direct result or a reasonably probable consequence of the  
16 act or omission.

17 The defendant here contends that the plaintiff him-  
18 self was negligent and that the negligence caused his injury.  
19 This is a defense, and the burden of proving the plaintiff  
20 was negligent is on the defendant. But the fact that the  
21 plaintiff's acts may have contributed to causing his accident  
22 or injury does not in this type of case prevent his recovery  
23 for damages.

24 In suits like this one, you are required to find  
25 whether the plaintiff, Mr. O'Hara, was guilty of contributory

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2 negligence and, if so, what percentage his contributory neg-  
3 ligence contributed to the accident. But this does not pre-  
4 vent his recovery. It only reduces the amount.

5 This is covered in the jury verdict form, and I  
6 think if you read it you will follow what we do here.

7 We ask that if you find contributory negligence you  
8 compute the percentage and then make a mathematical computa-  
9 tion. It is down here for you, and you can follow it in the  
10 jury room.

11 If you find that the accident was due partly to  
12 the fault of the plaintiff and you find that his negligence  
13 was, say, ten per cent responsible for the accident, then you  
14 will fill in this information on the verdict form.

15 Obviously, by using the number ten per cent I do not  
16 mean to suggest any amount. You may find zero per cent or  
17 ten per cent or ninety per cent or a hundred per cent. On  
18 the verdict form I will give you there will be a blank for  
19 you to insert your findings in this regard. Whatever amount  
20 if any, you find will not prevent the plaintiff from recovery.  
21 You will merely reduce the damages that you find proper by  
22 the percentage that you insert.

23 As I say, I think you will find this self-explanatory  
24 from the verdict form, which we have now used in this court  
25 for some time.



1                   MP  
2                   So much for the matter of liability and negligence  
3                   and the seaworthiness issue. Let us turn now to the matter  
4                   of damages.

5                   If you find that the defendant, Moore-McCormack  
6                   Lines, Inc. was not negligent and the vessel was not unsea-  
7                   worthy, that is the end of the case. Your verdict will be for  
8                   the defendant. Furthermore, if you find that the defendant  
9                   was negligent or that the vessel was unseaworthy or both but  
10                  that nevertheless any negligence of the defendant or any un-  
11                  seaworthiness of the vessel which you have found was not the  
12                  proximate cause of the accident, your verdict must be for  
13                  the defendant.

14                 On the other hand, if you find that the defendant  
15                 was negligent and that such negligence was a proximate cause  
16                 of the accident or that the vessel was unseaworthy and that  
17                 such unseaworthiness was a proximate cause of the accident,  
18                 then you will go on to consider the question of the plaintiff's  
19                 damages.

20                 On the subject of damages, plaintiff claims that he  
21                 suffered a permanent injury to his back consisting in substance  
22                 of an aggravation of a previous lumbosacral strain and disc  
23                 condition and that he sustained a concussion, which allegedly  
24                 resulted in headaches, falling and traumatic epilepsy.

25                 The defendant vigorously disputes the plaintiff

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suffers from traumatic epilepsy or any permanent injury resulting from the accident of May 21, 1969, which is the subject of this law suit.

Both sides have offered testimony and evidence on that subject. Both counsel have spoken extensively on that subject in their summations. I will not discuss that testimony and evidence in detail. Here again, it is your recollection of the evidence which controls, and it is for you to say what weight you will give to it and what testimony you believe.

If you reach this point in your deliberations, your aim should be to award a sum of money which will be fair and reasonable compensation to plaintiff for the injuries he received as a result of the accident of May 21, 1969. You may take into effect the nature and extent of his injuries, whether they are temporary or permanent in character, the pain and suffering that he has endured and which you believe to be reasonably certain that he will be called upon to endure in the future and the wages which he has lost and the wages if any that you believe to be reasonably certain that he will lose in the future.

There is no evidence that plaintiff has paid out anything for hospitals, doctors or medical expenses. The medical services which he received at the Maritime Hospitals



1 maintained by the United States Public Health Service are  
2 free.

3 A word on life expectancy:

4 Counsel have stipulated that as of the present  
5 date plaintiff has a life expectancy of twenty-five years.  
6 This fact may be considered by you in arriving at the amount  
7 of damages, if any, to be awarded.

8 Life expectancy is merely an estimate of the  
9 probable average remaining life of all persons in the United  
10 States of a given age and sex, and the estimate is based on  
11 the record of experience. So the inference that may reason-  
12 ably be drawn from life expectancy applies only to one who  
13 has the average health and exposure to danger of people of  
14 that age and sex.

15 In determining the reasonably certain life expect-  
16 ancy of the plaintiff you should consider in addition to  
17 counsel's stipulation all other facts and circumstances in  
18 evidence in the case bearing upon the plaintiff's life expect-  
19 ancy, including his occupation, habits, past health record  
20 and state of health at the time of his injury.

21 Life expectancy is not the same as work life expect-  
22 ancy. Work life expectancy is the probable average period of  
23 time a given person can be expected to work, since some people  
24 will retire before they die and others will die while still  
25 at work. Work expectancy, or work life expectancy is shorter

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2 than life expectancy. These should be factors which you will  
3 take into consideration when, as and if you reach the ques-  
4 tion of damages.

5 There has been testimony that the plaintiff has  
6 a condition of the back called disc degenerative disease or  
7 degenerative disc disease. I heard it both ways, and I may  
8 have heard it correctly both ways. The problem is in the back  
9 between something the doctors called the L-4 and L-5, which,  
10 as I understand it -- and you heard the testimony as well  
11 as I -- is a portion of the spine in the back of your body.

12 There has been testimony that the plaintiff has  
13 such a condition, and there has been evidence presented that  
14 the plaintiff had this condition prior to the time of the  
15 injury for which he is now suing.

16 If you find from a preponderance of the evidence  
17 that before these events of May 21, 1969, the plaintiff  
18 suffered no pain or disability, or if you find that any  
19 bodily condition from which he suffered before the injury  
20 aggravated as a result of his injury, then the plaintiff is  
21 entitled to recover for this aggravation to the same degree  
22 as if the entire disability originated completely from the  
23 events that happened on May 21, 1969.

24 On the other hand, if you find that the plaintiff  
25 has not proved by a preponderance of the evidence that the



1 accident sued on caused an aggravation of his pre-existing  
2 condition, you may not award damages for any losses that  
3 flow or arise from the pre-existing disability or injury.  
4

5 You must also consider in connection with damages,  
6 if you reach that point, the fact that each person who sues  
7 to recover damages which he claims were caused by another, has  
8 a legal duty to keep those damages to a reasonable minimum.  
9 He is compelled, if he claims the loss of wages, to make  
10 reasonable efforts to secure work.

11 Taxes: what about taxes? If you arrive at a verdict in  
12 favor of the plaintiff, you will not add any sum of money  
13 to the amount of the verdict on account of federal or state  
14 or city income taxes, since the amount awarded to the plaintiff  
15 by your verdict is not taxable income to the plaintiff  
16 within the meaning of these tax laws.

17 The mere fact that I have given you charges on the  
18 law of damages and on other matters does not in any way suggest  
19 that I believe that any damages are due in this case.  
20 Whether or not the plaintiff is entitled to recover and  
21 whether or not any damages are due is for you and you alone  
22 to decide.

23 If in the course of your deliberations your recollection  
24 of any part of the testimony should fail or you should  
25 find yourselves in doubt concerning my instructions to you on

1 the law, it is your privilege, if you so desire, to send out  
2 a note. We will arrange for you to return to the courtroom  
3 for the purpose of having such testimony or instructions read  
4 to you.  
5

6 The manner in which you communicate with me is for  
7 your forelady to send out a note, and I will try to respond  
8 to your request as promptly as possible.

9 In making the factual determinations on which your  
10 verdict will be based, you may consider only the exhibits  
11 which have been admitted in evidence and the testimony of the  
12 witnesses as you have heard it from the witness stand in  
13 this courtroom. However, arguments, remarks in summation  
14 of the opposing attorneys are not evidence, nor is anything  
15 that I say now or may have said with regard to the facts  
16 evidence.

17 In this case, the first six of the jurors will  
18 constitute the jury, and when I finish my charge, I will be  
19 excusing our two alternate jurors.

20 In this case, a unanimous verdict of the six of you  
21 is required.

22 In reaching your verdict, you are not to be  
23 affected by sympathy for either of the parties, what the re-  
24 action of the parties is or of the public to your verdict  
25 may be, whether it will please or displease anyone, be pop-



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2 ular or unpopular, or, indeed, any consideration outside of  
3 the case as it has been presented to you in this courtroom.  
4 You should consider only the evidence, both the testimony  
5 and the exhibits, find the facts from what you consider to  
6 be the believable evidence and apply the law as I have given  
7 it, to you to the particular facts as you find them.

8 As I have said before, your verdict will be deter-  
9 mined by the conclusion thus reached, no matter whom the  
10 verdict helps or hurts.

11 I have now outlined for you the rules of law ap-  
12 plicable to this case and the processes by which you weigh  
13 the evidence and determine the facts. In a few minutes, you  
14 will retire to the jury room for your deliberations. As I  
15 have indicated, Mrs. Lerner, who sits in seat number one,  
16 will serve as the forelady of this jury. In order that your  
17 deliberations may proceed in an orderly fashion, the fore-  
18 lady will chair the deliberations, but of course her vote  
19 is entitled to no greater weight than that of any other  
20 juror. Each of you has one vote, and your vote, that is,  
21 the vote of each of you, is entitled to equal weight as you  
22 sit around the table to discuss the case.

23 Your function -- to reach a fair conclusion from  
24 the law and the evidence -- is an important one. This case  
25 is an important one. It is important to the plaintiff; it is

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important to the defendant, and, as I have observed you each day, it has been treated the same way by you, and, of course, it should continue to be treated the same way by you.

When you are in the jury room, listen to each other; discuss the issues and the evidence in the case among yourselves. Remember in your deliberations that the dispute between these parties is for them no passing matter. They and the Court rely upon you to give full and conscientious deliberation and consideration to the issues and evidence before you. By so doing you carry out to the fullest your oaths as jury men and women to well and truly try the issues of this case and a true verdict render.

At this time, Miss Kruger, would you hand the verdict form to the forelady.

The form which I have just had handed to your forelady contains a total of seven questions. Counsel for each side has one of these verdict forms. The questions, in summary, are:

1. Whether or not the plaintiff has sustained his unseaworthiness claim.

2. Whether or not the plaintiff has established his negligence claim.

3. If you answer both of the first two questions "No", put an X at this point, and you stop.



Assuming that you answer one or the other of the first two questions in the affirmative, the fourth question calls upon you to put down the total dollar amount of damages which you wish to award or feel should be fairly awarded to the plaintiff.

The fifth question requires you to answer yes or no as to whether you find the plaintiff to have been contributorily negligent and whether his negligence was a proximate cause of the accident.

The sixth question provides that if you found "Yes" in number 5, that you compute the percentage the plaintiff's fault contributed to the accident, and then you would figure the Equivalent dollar amount that would be a percentage of the prior figure, and you put that in.

The last question is an arithmetic one. It requests that you subtract any reduction of the award for contributory negligence from the award itself and place on the bottom line the net recovery which you believe to be fair reasonable.

When you have completed the appropriate questions on the verdict form, you will advise the marshal who will attend you that you have reached a verdict, and at that time you will be asked to enter the courtroom and to indicate to us what your verdict is.

1 Excerpts from Minutes showing Frequency of Jury's  
2 Return To The Courtroom For Further Instructions.  
(The deputy marshal was duly sworn.)

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3 THE COURT: At this time, the Court will instruct  
4 the jury to proceed to the jury room and to commence its  
5 deliberations.

6 May I again remind you that those deliberations  
7 should be conducted with all jurors present, so if anyone  
8 wants to stop for a moment before you begin your delibera-  
9 tions, to take care of personal needs, I suggest you do that,  
10 and then gather around the table and deliberate.

11 You may now discuss the case fully and completely.  
12 Thank you very much.

13 (At 2:40 p.m., the jury retired, in the custody of  
14 the deputy marshal, to commence deliberating upon a  
15 verdict.)

16 THE COURT: At this point, I would like on behalf  
17 of the Court, and I am sure on behalf of counsel and the  
18 parties, to thank and excuse our two alternate jurors. You  
19 have been here for the entire time. I would suggest that it  
20 is a frustrating experience to have to say good-bye to your  
21 colleagues when they get to the dessert course in the menu,  
22 but it is most essential that we have alternate jurors avail-  
23 able. On more than one occasion I have found it necessary to  
24 press one into service. I have never, as far as I recall,  
25 had to press all my alternates into service, but at least



2 one has been used on several occasions, so that it is most  
3 important that we have you available. I am only sorry that  
4 I could not send you into the jury room to deliberate with  
5 the six regular jurors, but at this point, Miss Quinn and Mr.  
6 Waring, on behalf of the Court, I should like to thank you  
7 for your five days of service on this case and to excuse you.

8 Miss Kruger will indicate where and what you do from  
9 this point on.

10 THE CLERK: Will you please return to Room 109.

11 THE COURT: Perhaps you will be back with me to-  
12 morrow. I am supposed to start another case. So maybe  
13 you will get to be in the regular jury on that one.

14 Good luck to you both.

15 (The alternate jurors were excused and left the  
16 courtroom.)

17 THE COURT: We will now recess court during the  
18 jury deliberations.

19 (Recess.)

20 (At 3:00 p.m.):

21 THE COURT: I understand that a note has been sent  
22 out by the jury. I have the note in my hand, and I will  
23 read it:

24 "The jury requests to hear the testimony of Mr.  
25 Scott and Mr. Guyon with respect to their accounts of

the accident."

I would ask Miss Kruger to mark this first note from the jury as Court's Exhibit 1.

(Court's Exhibit 1 marked for identification.)

THE COURT: Mr. Reporter, do you have the appropriate portions of the testimony available to read?

THE REPORTER: I have, your Honor.

THE COURT: All right. Bring in the jury, and I will direct the reporter to read from the testimony, and I will inquire of the jurors whether this is the portion which they wish to have.

(Jury in box:)

THE COURT: I have your note. The court reporter has checked his own notes and indicated to me that he has the portion which you wish to have read of the testimony of Mr. Scott and Mr. Guyon.

The reporter will read what he believes you want. If you have heard what you want to hear when he is finished, fine. If he has not read to you all that you expected to hear, I will inquire at that time, and we will go further.

(Record read.)

THE COURT: If you should want any other testimony, you might just want to write a note right now, while you are here, and I will be very happy to oblige you if something



else is desired by any of the jurors.

All right. That completes the reading of the testimony of Mr. Green and Mr. Scott. I will first ask the jurors if there is any additional testimony that they wish read that may not have been read of either of those gentlemen.

All right. No one seems to require any additional testimony now. Is there any other testimony that you wish to have read, or do you wish to return to continue your deliberations?

All right. The jurors indicate they wish to return to continue their deliberations. The Court and counsel will remain available should there be any additional requests.

(At 3:30 p.m., the jury retired to resume deliberating upon a verdict.)

(At 4:15 p.m.):

THE CLERK: "The jurors would like to see the medical records from the Staten Island Hospital."

(Court's Exhibit 2 marked for identification.)

THE CLERK: The exhibits have been sent in to the jury room.

(At 5:00 p.m.)

THE CLERK: "The jury wants the Miami, Florida, and New Orleans records.)

(Court's Exhibit 3 marked for identification.)

2 THE CLERK: The exhibits have been sent in to the  
3 jury room.)

4 (At 5:55 p.m.):

5 (Jury in box:)

6 THE COURT: Ladies and gentlemen, you have been  
7 deliberating for about three hours, and I note the time,  
8 which is going on six o'clock. I have consulted with counsel,  
9 and all of us feel that it might be appropriate for me to  
10 suggest that you may want to recess now and return to continue  
11 your deliberations tomorrow morning.

12 You are still on your regular term of jury service,  
13 so unless you have a very strong feeling to the contrary, it  
14 would be my suggestion that we gather up the material that  
15 you have been working on and that we recess now until tomorrow  
16 morning.

17 Would that suit the jury as a group? I see every-  
18 one nodding their heads in the affirmative. I am sure you have  
19 put in a busy day. It is good to get a good night's sleep  
20 and then return.

21 Let me see your preference. The question is:  
22 9:30, which would be my preference, or ten a.m. Who is for  
23 9:30? Again, a unanimous jury. Excellent.

24 We will recess now, and you will return here to  
25 continue your deliberations in the jury room tomorrow morning



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at nine-thirty. I will be available to you beginning at that hour, and counsel will be available as well.

Let me caution you that you should not speak with anyone, at home or on the way home or on the way back here, regarding this case. You should only resume your deliberations when you are all together, tomorrow morning. So if you see to it first that Miss Kruger receives the exhibits, and if, Madam Forelady, you would like to place your verdict form in a sealed envelope and leave it with Miss Kruger, she will give it to you first thing in the morning.

Is that satisfactory? Just be sure it is sealed.

THE FORELADY: May I ask a question?

THE COURT: Yes. I think that would be appropriate. Is that all right with counsel?

MR. SCHWARTZ: Absolutely.

THE FORELADY: Is it possible for the jury to obtain any factual information that was not brought out in testimony in court?

THE COURT: No, no. That is a question I know I sometimes get from jurors after the case.

You now have a record as such, and in essence it constitutes the four corners of the case, and just as I admonished you not to discuss the matter with anyone, so that no extraneous information comes to you, I must tell you that

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started, and it will be sent in to you.

Is there anything else before we recess for this evening?

THE FORELADY: No.

THE COURT: I have watched this jury, and I know that you have listened diligently, and I am certain that you have conducted your deliberations in the manner you should, which is give and take among yourselves in an attempt to reach a fair and just verdict.

So with the admonition again that you not discuss the matters at hand with anyone, we will recess court at this time and hope that you all get home safely. We have what may be a half hour of daylight left. Get home safely, and I will be here available to you when you return in the morning to continue your deliberations tomorrow.

(Adjourned to January 9, 1974, at 9:30 a.m.)

- - -



MIKE O'HARA

VS

70 Civ 4011

MOORE-McCORMACK LINES, INC.

New York, N. Y.

January 9, 1974 - 9:30 a.m.

(Trial continued:)

(At 9:45 a.m.):

THE CLERK: We have a note from the jury. It  
reads:

"May we hear the Judge's charge with respect to the  
definition and proof of negligence."

(Court's Exhibit 4 marked for identification.)

(At 10:10 a.m.):

THE CLERK: We have another note from the jury. It  
reads:

"May we have Plaintiff's Exhibit 9 and Defendant's  
Exhibits F. G and H."

(Court's Exhibit 5 marked for identification.)

THE COURT: Bring the jury in.

(Jury in box:)

THE COURT: I would like to commend this jury as  
well as counsel. I know you have been in there deliberating  
since early this morning, and I think it is consistent with

1 the manner in which you have performed your duties in this  
2 case, and I really appreciate it, and I am sure that the rest  
3 of us do, as well.

4 I have two notes which have come from the jury.  
5 The first is marked Court's Exhibit 4 and reads as follows:

6 "May we please hear the Judge's charge with respect  
7 to the definition of and proof of negligence."

8 Second, which is now marked Court's Exhibit 5:

9 "May we have Plaintiff's Exhibit Number 9" --

10 -- which is the Moore-McCormack ship's medical log,  
11 and which is in evidence,

12 -- "and Defendant's Exhibits F, G and H."

13 Those are specific entries from the same log.

14 Those were in evidence. I would have the record reflect  
15 they have been sent in to the jury pursuant to the stipulation  
16 between counsel that the jury might receive any exhibits which  
17 it desired to have.

18 Have counsel prepared the list of exhibits that we  
19 discussed last night?

20 MR. SCHWARTZ: Yes, Judge. We both --

21 THE COURT: Do you have them here?

22 MR. REILLY: They have been given to the jury.

23 THE COURT: They have been given to the jury? Very  
24 good. I was unaware of that, but that is what I had requested  
25



counsel to do.

Now we will turn to your request, which is Exhibit 4, to hear the charge with respect to the definition and proof of negligence.

I give you a choice. If you would like to hear it from our very capable court reporter, he will do it, and if you would like to hear it from me, I will do it. I think I can do it conveniently, because I have it before me.

If the jury wants more than I read, I will give you more.

This is in response to your request that I repeat that portion of my charge regarding definition and proof of negligence.

Let's consider the plaintiff's claim for negligence under the Jones Act. In order to recover, the plaintiff must prove that his employer was negligent. Then the question you must first consider, therefore, is, what is negligence?

Negligence is the doing of some act that a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do under the same or similar circumstances. It is, in other words, the failure to use ordinary care under the circumstances.

The mere occurrence of an accident, of course, does not raise any presumption of negligence.

That is the definition of negligence which I gave you previously. If that is all that you wanted, I will stop there. If you want me to go further with my charge, I would be happy to continue with my charge at this point.

Let me ask you: have I read to you all that you want, or would you want me to continue with my charge?

I see Juror Number 6 has raised his hand.

JUROR NUMBER 6: I would like to hear the rest of it, your Honor.

THE COURT: You would like me to continue?

JUROR NUMBER 6: Yes, sir.

THE COURT: All right. I will continue.

The obligation of a ship owner under the Jones Act for the safety of seamen is substantially greater than that of an ordinary employer to his employees. The word "Negligence", therefore, as used in the Jones Act, which makes the employer of seamen liable for his negligence, must be given a liberal interpretation. It includes any breach of any obligation that the employer owes to seamen, including the obligation of seeing to the safety of the crew.

Under the Jones Act, if the employer committed some act or omission that played any part, no matter how small, in actually bringing about or causing injury to Mike O'Hara, then you should find that the employer was negligent.



1 Negligence, under the Jones Act, may consist of a  
2 failure to comply with a duty required by law. Employers  
3 of seamen have a legal duty to provide their employees with  
4 a safe place in which to work. If you find that in this case  
5 the plaintiff was injured because the defendant failed to  
6 furnish him with a reasonably safe place to work and that  
7 the plaintiff's working conditions could have been made safe  
8 through the exercise of reasonable care, then you may find  
9 that the defendant was negligent.  
10

11 An employer is legally responsible for the negligence  
12 of its employees while acting within the course and scope of  
13 their jobs. It is not necessary to show that the management  
14 or officers of the employer company were themselves negligent  
15 in any way for it to be responsible.  
16

17 There is one other aspect of negligence, which  
18 appears later in my charge, which I think for the sake of com-  
19 pleteness might be given to you at this time. It is what was  
20 called comparative negligence, and I charged you as follows:

21 The defendant here contends the plaintiff was him-  
22 self negligent and that that negligence caused his injury.  
23 This is a defense, and the burden of proving the plaintiff  
24 was negligent is on the defendant. But the fact that the  
25 plaintiff's acts may have contributed to causing his accident  
and injury does not prevent his recovery of damages. In suits

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1 like this one, you are required to find whether the plaintiff  
2 was guilty of contributory negligence and, if so, what per-  
3 centage his contributory negligence contributed to the accident.  
4 But this does not prevent his recovery. It only reduces the  
5 amount.  
6

7 Now, you will recall, now that you have had the  
8 verdict form in the jury room, there is an area in the middle  
9 of that questionnaire which gets to this point, and I think  
10 you can relate what you have before you in the jury room to  
11 what I have just said.

12 Let me go on, back to my charge:

13 If you find that the accident was due partly to the  
14 fault of the plaintiff and you find that his negligence was  
15 ten per cent responsible for the accident, then you would fill  
16 in this information on the special interrogatories, the ver-  
17 dict form that I give you.

18 Obviously, by using the number, ten per cent, I do  
19 not mean to suggest any amount. You might find zero per cent  
20 or one per cent or ten per cent or one hundred per cent.

21 On the special verdict form I gave you, there is a  
22 blank for you to insert your findings in this regard. What-  
23 ever amount you find will not prevent the plaintiff from  
24 recovering. You merely reduce the damages that you find proper  
25 by the percentage that you insert.



I would just turn to the jurors and ask if by reading from my charge I have answered your question, which is contained on Court's Exhibit 4, which is:

"May we please hear the Judge's charge with respect to definition of and proof of negligence."

I see each and every one of the jurors has nodded his or her head, and I will assume that I have now fulfilled the jury's request.

Is there anything else you wish to take up with the Court before you return to your jury room?

MR. SCHWARTZ: Judge, may I approach the bench?

THE COURT: You may.

(At the side bar:)

MR. SCHWARTZ: The thought occurred to me whether within the negligence which they inquired about, whether the question of unseaworthiness was included.

THE COURT: Well, they didn't ask for it. You see, the thing is, I don't think it is inadvertent. The verdict form is very clear relative to the two things being separately considered.

I will show you the note again. I feel that I have complied with the jury's request.

MR. REILLY: I think so, your Honor.

MR. SCHWARTZ: Yes; I think so, in that regard. It

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2 just occurred to me that, being laymen, they would havemeant  
3 the whole thing, and that would have been unseaworthiness  
4 also.

5 THE COURT: I suggest this: their note said "negli-  
6 gence". When I read the portion of my charge, there was an  
7 indication that they wanted more, and I continued, and I  
8 read every portion of the charge that I knew of which related  
9 to the subject. At that point, the jury indicated they had  
10 heard what they wanted to, and, under the circumstances, I  
11 would decline to charge further.

12 MR. SCHWARTZ: Exception.

13 THE COURT: You have an exception. All right.

14 MR. SCHWARTZ: For the record.

15 (In open court:)

16 THE COURT: All right. We have just had a short  
17 side bar conference, and we all agree that the fact that the  
18 jurors have shaken their heads in the affirmative indicates  
19 that they have what they want now.

20 We are here, and we await you. If there is anything  
21 else you have in the way of a question, do not hesitate to  
22 ask it. We will keep an eye on the time only with the view  
23 that if I find you are deliberating into the lunch hour, if  
24 you do think you are going to go that long, you might indicate  
25 to me whether you would prefer sandwiches to be brought in or



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2 to be taken out.

3 Let me suggest this: If you are still deliberating  
4 by twelve o'clock, which is a full hour and a half from now  
5 -- I don't know whether you will or won't -- that you prepare  
6 a list indicating what you would like to have, and we will  
7 see to it that you get it. However, if you complete your de-  
8 liberations in the interim period, then, under the circum-  
9 stances, obviously, the case will be at an end.

10 I will leave that to your judgment, and will do  
11 whatever suits the jury's pleasure in this regard.

12 The jury is requested to return to the jury room  
13 to resume their deliberations.

14 Thank you.

15 (At 10:30 a.m., the jury left the courtroom to  
16 resume deliberating upon a verdict.)

17 (At 12:00 m.:)

18 THE COURT: Gentlemen, it is now twelve noon. I  
19 have indicated to the jury that I am excusing counsel until  
20 two p.m., and I am available at this time should the jury  
21 have any questions.

22 The marshal has indicated to me the jury has no  
23 questions, and therefore we will recess court, and counsel are  
24 excused until two p.m. and directed to return at that time.

25 Is that satisfactory?

2 MR. SCHWARTZ: Yes, Judge.

3 MR. REILLY: Very good. Thank you, your Honor.

4 (A luncheon recess was taken.)

5 ---

6 A F T E R N O O N      S E S S I O N

7 2:00 p.m.

8 (Jury in box:)

9 THE COURT: Good afternoon, ladies and gentlemen.

10 I can only suggest that the weather has not improved  
11 since you arrived this morning, and it seems to be fairly  
12 nasty out, and I think we are going to have this with us for  
13 a while.

14 I understand that the jury has agreed upon a verdict.

15 THE FORELADY: Yes; it has, your Honor.

16 THE COURT: And do you have the sealed envelope  
17 containing the verdict?

18 THE CLERK: I have, your Honor.

19 THE COURT: Would you hand it to the forelady and  
20 have her open the envelope, and you can address the forelady  
21 with your usual questions, Miss Kruger.

22 (Roll of jurors called; all answered present.)

23 BY THE CLERK:

24 Q Madam Forelady, has the jury agreed upon a verdict?

25 A We have.



MOTION TO SET ASIDE VERDICT

\* \* \*

8 THE COURT: The Court will now hear any motions which  
9 counsel wish to make.

10 MR. SCHWARTZ: On behalf of plaintiff, I wish to  
11 move to set aside the verdict as against the weight of evi-  
12 dence and upon the ground of gross inadequacy.

13 Does your Honor want me to go into the details of  
14 it at this time?

15 THE COURT: I suggest that you do it, and then I  
16 will hear from Mr. Reilly.

17 MR. SCHWARTZ: We had on the question of liability  
18 a man who was standing still on the escalator. There was no  
19 testimony to the contrary. There isn't one iota of evidence  
20 in the entire case that indicates that this man did anything  
21 that could possibly, by the longest stretch of the imagina-  
22 tion, say that he possibly contributed to this situation.

23 Where and how could anybody dream up contributory  
24 negligence except as a figment of their imagination, which has  
25 nothing to do with any evidence in the record at all?

As far as the amount is concerned, the testimony of their own doctor, Dr. Balensweig, stated that in this case the accident aggravated his disc condition, and he also testified that he had a permanent condition.

The testimony shows that at the time of this accident the man was symptom free, but even if he wasn't, the testimony nevertheless is that this accident rendered him disabled for the remainder of his life on the question of the back condition.

Now, we've got this question of the head. There was nobody who stated that this man was not unconscious as a result of this accident, and everybody testified that he was. And what do we find? A continuous period of treatment from the very moment of this accident, when the man was helped from the ground into a wheel chair and couldn't even get up by himself after he regained consciousness.

He was taken to the hospital, and the ship arrived on the 23rd; the very next day, the man is at the Public Health Service, where it shows a period of continuous treatment as far as the head is concerned, where it shows that the man suffered blackouts, which went in at the time as part of the treatment and history, where there could be no possible thought that anybody is making up a statement that the man had blackouts and continuously. I mean, there was no lawyer in the



case, nothing.

He had headaches from the very moment, dizziness from the very moment, for which he was given treatment continuously.

I won't go into the question of whether he suffered traumatic epilepsy. All right. That could be a question of fact, so the jury resolved it against him. But nevertheless, on a question of continuous suffering and treatment, it shows throughout, continuously, that this man suffered severe headaches and dizziness, which, wherever he went, whether it was Miami or Louisiana, New York, Brooklyn, Staten Island, shows a continuous condition of the headaches.

There is no question about the loss of earnings. Certainly in that '69 period, which is shown both by the records of the defendant and the income tax report of the plaintiff, which was not contradicted in any manner, shape or form.

No matter what one would allow, to what extent, taking it all together, to arrive at a ridiculous amount of this -- I say that with all the sincerity that I can command, whatever the event or what it may have been that produced this figure had nothing to do with the facts and testimony in this case.

If there ever was a case that indicated a miscarriage

1 of justice on the question of amount and with the contributory  
2 negligence fault combined, contributory negligence of seventy-  
3 five per cent -- It showed that the jury did not consider the  
4 facts of this case, because where did they get that from?  
5 Not from this record. I can't possibly conceive it, and I  
6 am positive that on the evidence of this case the jury did  
7 not go according to the evidence in this case.  
8

9           Whatever they were doing in the jury room did not  
10 deal with the facts and evidence of this case. It couldn't.  
11 How could they get seventy-five per cent contributory negli-  
12 gence of the plaintiff?

13           That is an illustration of what went on, and I  
14 respectfully request this Court to set aside the verdict.

15           THE COURT: Mr. Reilly?

16           MR. REILLY: As I understood the plaintiff's case,  
17 your Honor, he described to the jury the way he positioned  
18 himself on the escalator, with one foot raised above the  
19 other foot rather than two feet on the same step of the es-  
20 calator while he was carrying a tray of glasses, I think it  
21 was.

22           The jury didn't leave their experience outside the  
23 courtroom. The escalator was described as the same type of  
24 escalator that you see in a department store, and the jurors  
25 were well aware of how you were to ride on such an escalator.



Further than that, the plaintiff said that the escalator came to a stop, and two seconds later it resumed at the same speed, its normal rate of speed.

So I urge that the jury accepted the plaintiff's version of the accident, and they knew that if he had been holding properly to the hand rail on the escalator he would not have fallen.

With regard to the items of damage, we rejected the head injury, I believe, by our neurosurgeon, Dr. Kirshenbaum, out of hand. The Public Health Service found Mr. O'Hara fit for duty neurologically in September of 1969. The testimony of Dr. Balensweig was to the effect that if the accident was an aggravating feature of the back case, the plaintiff would have recovered from the effects of the accident again in the fall of 1969.

I urge, your Honor, that the determination of liability as well as the amount of damages is well within the province of the jury, and I urge that the plaintiff's motion be denied.

THE COURT: The Court concludes that there is sufficient evidence in the record to support the jury's verdict. In addition, the Court observes that the jury did appear to understand the case. They dealt first with questions of liability, returning shortly after they had begun their

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) SS.:

*Harry Mahoney* being duly sworn, deposes and says that he is employed by JACOB RASSNER, attorney for the above named *Plaintiff Appellant* herein.

That on the *25<sup>th</sup>* day of *October*, *1974*, he served the within *Appendix* upon *Hyde, Dickinson, & Kelly* the attorneys for the above named *Defendant Appellee*, by depositing a true copy of the same securely enclosed in a post-paid wrapper at an Official Depository maintained and exclusively controlled by the United States at 15 Park Row, New York City, N. Y., directed to said attorney for the *Defendant Appellee*, at No. *61 Broadway, New York*, N. Y., that being the address within the state designated by *them* for that purpose upon the proceeding papers in this action, or the place where *they* then kept an office between which places there was then and now is a regular communication by mail.

Deponent is over the age of 18 years.

*Harry Mahoney*

Sworn to before me this  
*28<sup>th</sup>* day of *October*, *1974*  
*Allen Leonard*



